PP

v.

MOHD AMIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI MAKINUDIN J
[CRIMINAL TRIAL NO: 45-34-2000]
16 OCTOBER 2000

EMERGENCY LEGISLATION: *Validity - Right of appeal - Regulations prescribing right of appeal to Supreme Court which no longer exists - Ambiguity as to whether accused has right of appeal from High Court to Federal Court - Essential (Security Cases) Regulations 1975, reg. 26 - Whether invalid - Constitution (Amendment) Act 1994, s. 46*

EMERGENCY LEGISLATION: *Validity - Regulations made under proclamation of emergency - Whether valid if proclamation of emergency not valid - Whether proclamation of emergency valid - Whether King may proclaim emergency independently without advice of cabinet of ministers*

CONSTITUTIONAL LAW: *Courts - Appeals - Jurisdiction of Federal Court - Whether Federal Court empowered to hear appeals directly from High Court - Whether jurisdiction of Court of Appeal to hear appeals from High Court exclusive - Whether statutes prescribing right of appeal directly from High Court to Federal Court unconstitutional - Consequence of statutes not providing right of appeal from High Court to Court of Appeal*

During examination-in-chief in the criminal trial conducted under the Essential (Security Cases) (Amendment) Regulations 1975 ('ESCAR'), counsel for the first accused raised the preliminary objection that ESCAR was invalid on two grounds.

The first was that ESCAR was invalid because reg. 26 of ESCAR originally spoke of a right of appeal to the Federal Court but subsequently substituted it with a right of appeal to the Supreme Court which now was no longer in existence. It was counsel's contention that the Courts of Judicature (Amendment) Act 1994 did not provide for the necessary changes.

The second ground was that the 1969 Proclamation of Emergency dated 15 May 1969 under which the Emergency (Essential Powers) Act 1979 ('Act 216') was enacted to revive ESCAR was null and void on the ground that the King when proclaiming the emergency could not have acted on the advice of the cabinet or a minister under the general authority of the cabinet following art.

40(1) of the Federal Constitution because the cabinet then had ceased to exist on Parliament standing dissolved. There was no appointment pursuant to art. 43(2) of the Federal Constitution and only a care-taker government could have been constituted. It was contended that a care-taker government could only carry on day-to-day administration and could not lawfully advice the King to declare an emergency. Further, it was argued that both art. 150(8) of the Federal Constitution and s. 12 of Act 216 were not retrospective thereby not affecting the proclamation in relation to its validity in point of judicial review.

Held:

[1] In respect of the first objection, the applicable law was the Constitution (Amendment) Act 1994 A885 and not the amendments to the Courts of Judicature Act 1964, namely Act A886 or Act A606. This was because by virtue of s. 46 of the Constitution (Amendment) Act 1994 A885, all references in and under the Federal Constitution or any written law to the Supreme Court shall be construed as references to the Federal Court. The right of appeal of the accused under ESCAR was therefore preserved.

[2] The amendment was nothing more than a change of name for the court from "Supreme" to "Federal". It did not in any manner alter or abolish the status of the Federal Court which is still the highest appellate court in the country.

[3] If a statute does not provide for a right of appeal to the newly created Court of Appeal, then an appeal has to lie only to the Federal Court. Article 121(2)(a) of the Federal Constitution states that the Federal Court shall have jurisdiction to determine appeals from the decisions of the Court of Appeal, the High Court or a judge thereof. This means that the jurisdiction of the Court of Appeal to hear appeals form the High Court is not exclusive and the Federal Court is also empowered to hear appeals from the High Court.

[4] Article 128(3) of the Federal Constitution provides that the jurisdiction of the Federal Court to hear appeals from the High Court shall be such as may be provided by federal law. It is therefore not unconstitutional for a particular statute to prescribe a right of appeal direct to the Federal Court.

[5] Even if the court were to strike down reg. 26 of ESCAR as null and void, it would not invalidate the whole of ESCAR since the right of appeal, avenue and procedure for appeal would still be guaranteed by other existing laws such as the Criminal Procedure Code and the Courts of Judicature Act 1964.

[6] In respect of the second objection, it is clear from art. 150(1) of the Federal Constitution that the King may issue a proclamation of emergency if he is satisfied that a grave emergency exists. The exercise of this power is within the royal prerogative of the King who may act personally without the advice of the cabinet or a minister acting under the general authority of the cabinet.

[7] Even if the King has to act on the advice of a cabinet of ministers in order to invoke his power to issue a proclamation of emergency, then if parliament is dissolved and no new appointments are made while its dissolution is on, the cabinet does not cease to exist and it can advise the King in the exercise of his functions. The subsisting cabinet will be the care-taker government and can advise the King on policy matters including national emergencies, but it is up to the King whether to act pursuant to the advice or not.

[8] To insist that art. 40(1) of the Federal Constitution must be strictly adhered to in such a situation would render art. 150(1) nugatory. Article 150(1) of the Federal Constitution must be given a purposive interpretation.

[9] Even if art. 150(8) of the Federal Constitution is not retrospective in operation, the King has the royal prerogative and the personal discretion to invoke a proclamation of emergency with or without the advice of the cabinet.

[ESCAR not invalid and trial to continue forthwith.]

Case(s) referred to:

Ahmad Tajudin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2000] 2 CLJ 695 ***(refd)***

Gana Muthusamy v. LM Ong & Co [1998] 4 CLJ 878 ***(refd)***

Hinds v. The Queen [1977] AC 195 ***(refd)***

Kulasingam v. PP [1978] 2 MLJ 243 ***(refd)***

Liyanage & Ors v. The Queen [1967] AC 259 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***

Madhavan Nair v. Government of Malaysia [1975] 2 MLJ 286 ***(refd)***

Pahang South Union Omnibus Co Bhd v. Minister of Labour and Manpower [1981] 2 MLJ 199 ***(refd)***

Phang Chin Hock v. PP [1980] 1 MLJ 70 ***(refd)***

PP v. Chu Beow Hin [1982] 1 MLJ 135 ***(refd)***

PP v. Sihabduin & Anor [1980] 2 MLJ 273 ***(refd)***

Stephen Kalong Ningkan v. Government of Malaysia [1968] 1 MLJ 119 ***(foll)***

Teh Cheng Poh v. PP [1979] 2 MLJ 238 ***(refd)***

Teh Cheng Poh v. PP [1980] AC 458 ***(refd)***

Legislation referred to:
Constitution (Amendment) Act 1994, s. 46
Courts of Judicature (Amendment) (No 2) Act 1984, s. 9
Courts of Judicature (Amendment) Act 1994, s. 46
Courts of Judicature (Amendment) Act 1995, s. 17
Emergency (Essential Powers) Act 1979, s. 9(1), 12, 13(1), (2)
Essential (Security Cases) (Amendment) Regulations 1975, reg. 26(1)
Federal Constitution, arts. 40(1), (2)(a), 43(2), 44, 46, 121(2)(a), 128(3), 150(1), (2), (5), (6), (8)
Penal Code, s. 121

For the accused - Karpal Singh (Jagdeep Singh Deo & Gobind Singh Deo with him)
For the prosecution - Mohtar Abdullah A-G (Gani Patail SDPP, Mohd Yusuf Zainal Abidin SDPP, Tun Abdul Majid Tun Hamzah DPP, Sallehudin Saidin DPP, Asmah Musa DPP & Fatnin Yusuf DPP with him)

Reported by Yow Ting Fong

JUDGMENT

Zulkefli Makinudin J:

All the twenty-nine accused persons stand charged as follows:

> Bahawa kamu semua dari bulan Jun 2000 hingga 6 Julai 2000 di beberapa tempat di dalam Negeri Perak Darul Ridzuan iaitu:
>
> (a) Pos 2, Km 19, Kuala Rui, Jalanraya Timur Barat, Gerik, Hulu Perak;
>
> (b) Batalion 304, Infantri (AW), Kem Gerik, Gerik, Hulu Perak; dan
>
> (c) Bukit Jenalik, Kemajuan Tanah Ngor, Sauk, Mukim Cegar Galah, Daerah Kuala Kangsar,
>
> telah melancarkan peperangan terhadap Yang Di-pertuan Agong dan oleh itu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 121, Kanun Keseksaan.

In the midst of the evidence in-chief of the twenty-ninth witness for the prosecution Mr. Karpal Singh, the learned counsel for the first accused informed the court that he wished to raise a preliminary objection on points of law which may have an effect on the conduct of the trial. Mr. Karpal Singh submitted that the Essential (Security Cases) (Amendment) Regulations 1975 (hereinafter referred to as ESCAR) pursuant to which the trial of all the twenty-nine accused persons is being tried are invalid, null and void and of no consequence. Hence the trial should be forthwith halted in its tracks and it be held that although the charge under s. 121 of the Penal Code may be good in law but the trial upon that charge with 28 witnesses having given evidence and the twenty-ninth witness in the process of giving evidence in-

chief is a nullity and in line with the decision by the Privy Council in *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458, the court should consider whether or not a new trial ought to be ordered. The Honourable Attorney-General for the prosecution on the point raised by Mr. Karpal Singh expressed his view that it was premature then for counsel to make such an application and more so when the twenty-ninth witness for the prosecution is in the midst of giving evidence. For convenience the Attorney-General impressed upon the court that the said twenty-ninth witness should be allowed to complete his evidence first. Henceforth, I allowed the oral application made by Mr. Karpal Singh for him to raise a preliminary objection on points of law after the twenty-ninth witness for the prosecution completes his evidence. It is my view that the issues raised by Mr. Karpal Singh are issues of law which should be disposed of as preliminary issues and which should be decided upon forthwith before the next witness is called to testify.

At the outset of his submission Mr. Karpal Singh submitted that the court should take note of the fact that ESCAR constitutes a draconian legislation which departs radically from the ordinary rules of evidence and procedure and the court should go the extra mile to ensure the trial is being conducted under rules which have the sanctity of law. The case of *Liyanage & Others v. The Queen* [1967] AC 259 was cited by counsel which involved a trial under the Criminal Law (Special Provisions) Act No. 1 of 1962 of Ceylon in relation to trial of those involved in an abortive coup d'etat in Ceylon on 27 January 1962. The act contained similar provision like those in ESCAR.

The provisions in the act contained substantial modifications of the Criminal Procedure Code. The act also provided for the admission in evidence of certain confessions and statements to the police inadmissable under the Evidence Code of Ceylon. The 11 accused in this case were convicted of three offences in respect an abortive *coup d'etat* on 27 January 1962. The offences were first, that they conspired to wage war against the Queen, secondly, that they conspired to over-awe by means of criminal force or the show of criminal force on the Government of Ceylon and, thirdly, that they conspired to overthrow otherwise than by lawful means the Government of Ceylon by law established. 13 other accused who were tried with the appellants were acquitted. Each of the appellants was sentenced to 10 years rigorous imprisonment and forfeiture of all his property. On appeal to the Privy Council, the appeals of the 11 appellants were allowed and their convictions and sentences quashed as it was agreed between the parties that if the acts were *ultra vires* and invalid, the convictions could not stand.

In his submission proper on the first main issue raised as a point of preliminary objection Mr. Karpal Singh submitted that ESCAR are invalid for the following reasons and in the context of the following background:

ESCAR were made pursuant to the Emergency (Essential Powers) Ordinance, 1969 on 1 November 1975. ESCAR were declared unconstitutional by the Privy Council in the case of *Teh Cheng Poh v. Public Prosecutor (supra)* on 11 December 1978. By the Emergency (Essential Powers) Act 1979 Act 216 enacted by Parliament, ESCAR were revived and resurrected with legislative force with effect from 26 January 1979.

The original reg. 26(1) of the ESCAR which states:

> The accused and the Public Prosecutor shall have the right of appeal as set out below:
>
> (a) if the decision is made by the High Court in the exercise of its original jurisdiction, he may appeal to the **Federal Court**;
>
> (b) if the decision is made by a subordinate court other than the Court mentioned in subparagraph (c), he may appeal to the High Court whose decision shall be final; and
>
> (c) if the decision is made by the Sessions, whose President is conferred with special jurisdiction under subsection (3) of section 63 of the Subordinate Court Act, 1948, he may appeal to the High Court with a further right of appeal to the **Federal Court**;
>
> and the decision of the **Federal Court** in respect of an appeal under subparagraphs (a) and (c) shall be final; and for the purpose of this paragraph, the word 'decision' includes the whole or any part of any judgment, order or sentence made or passed by the relevant Court during the course or at the end of the trial or the hearing of an appeal, as the case may be, in that Court. (emphasis added)

was revived with the resurrection of the entire set of the regulations of the ESCAR.

Learned Counsel Mr. Karpal Singh submitted that appeal to the Federal Court was preserved under Act 216. In other words, any decision of the High Court in a security case triable under ESCAR was appealable up to the Federal Court. However, by the Courts of Judicature (Amendment) (No. 2) Act 1984 Act A606 which came into force on 1 January 1985 the Supreme Court was created with a two-tier system comprising appeals from the High Court to the Supreme Court. Section 9 of this Act reads:

> The principal Act (Courts of Judicature Act, 1964) and all other written laws in force are amended by the substitution of the expression "Supreme Court" for "Federal Court" wherever the latter occurs.

This meant in reg. 26 of ESCAR, Supreme Court was substituted for Federal Court.

Before January, 1985 the Federal Court was the highest court in the country. Mr. Karpal Singh further submitted that with the coming into force of the Courts of Judicature (Amendment) Act 1994 Act A886 Federal Court was substituted for the Supreme Court in the Courts of Judicature Act 1964. However, other written laws in force remained unamended. There was no equivalent of s. 9 of the Courts of Judicature Act (Amendment) (No. 2) Act 1984 Act A606 in the courts of Judicature (Amendment) Act 1994 Act A886.

The Courts of Judicature (Amendment) Act 1995 Act A909, which came into force on 24 June 1994 brought in s. 17 which reads:

> Any proceeding which is pending before the Supreme Court on the 23nd June, 1994 shall be continued or proceeded with, as the case may be, before the Federal Court and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994.

Mr. Karpal Singh submitted that as can be clearly seen, this saving and transitional clause did not have an equivalent of s. 9 of the Courts of Judicature (Amendment) (No. 2) Act 1984 Act A606 to account for am other written laws in force at the coming into force of the Courts of Judicature (Amendment) Act (1994) Act A886. It is the contention of Mr. Karpal Singh that this means reg. 26 of ESCAR remains unamended up to now and appeals from the High Court can only go to the Supreme Court which does not exist. It was submitted that reg. 26 is invalid as recourse is given to a court which does not exist and in the present case where the punishment under s. 121 of the Penal Code is death or imprisonment for life which extends to the duration of one's life, the court must act cautiously and with solemn circumspection. Learned counsel submitted that the question which has to be also addressed by the court with all the force at its command is,

> Does the invalidity of Regulation 26 invalidate the entire set of the Regulations?

It was emphatically submitted that it does and reg. 26 is not severable from the rest of the regulations. The Privy Council case of *In Hinds v. The Queen* [1977] AC 195 was cited to support the said proposition which *inter alia* at p. 229 states as follows:

> The test of severability has been laid down authoritatively by the Board in *Attorney-General for Alberta v. Attomey-General for Canada* [1947] AC 503 @ 518.
>
> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

Mr. Karpal Singh further submitted the right of the appeal accorded to the accused under reg. 26 is a matter of substance, and not a mere matter of practice and procedure and such a right has accrued to all the accused from the commencement of the trial. This being the position it was submitted that reg. 26 is inextricably bound up with the other regulations in ESCAR and cannot independently survive and on a fair review of the whole matter, it can be assumed the legislature would not have enacted what survives without enacting that which is *ultra vires*. It is also the submission of Mr. Karpal Singh that as the Supreme Court does not exist anymore, the question of interpreting reg. 26 does not arise. The right of appeal given to a non-existent court is a contradiction in terms; it is an impossibility. ESCAR has to be strictly construed as the life and liberty of all the accused are involved.

The second issue raised by Mr. Karpal Singh as a point of preliminary objection which required to be addressed relates to the 1969 proclamation dated 15 May 1969 under which the Emergency (Essential Powers) Act 1979 was made to validate ESCAR which had been declared unconstitutional by the Privy Council in *Teh Cheng Poh v. Public Prosecutor* on 11 December 1978.

It was submitted by counsel that the 1969 Proclamation of Emergency is null and *void.* The two cases of *Teh Cheng Poh v. Public Prosecutor (supra)* and *Madhavan Nair v. Government of Malaysia* [1975] 2 MLJ 286 were cited whereby it was contended that the King when proclaiming an emergency acts on cabinet advice or on the advice of a minister acting under the general authority of the cabinet and does not act personally. It was argued that art. 40(l) of the Federal Constitution provides for the King to act on the advice of the cabinet or of a Minister acting under the general authority of the cabinet. Mr. Karpal Singh submitted that it is common knowledge the dewan rakyat had been dissolved to enable elections to be held on 10 May 1969 and the fact that on 15 May 1969 there was no cabinet, the King could not have acted on the advice of the cabinet as the cabinet ceased to exist on the dewan rakyat standing dissolved. Likewise, it was contended there could have been no minister acting under the general authority of the cabinet as there was then no existing cabinet. In the circumstances counsel submitted that clearly the provision of art. 40(l) of the Federal Constitution could not have been invoked by the King. Mr. Karpal Singh then posed the question who could have lawfully advised the King to proclaim an emergency on 15 May 1969? Learned counsel submitted that art. 43(2) in relation to the cabinet provides for, *inter alia,* an appointment of a person while parliament is dissolved. It was submitted it is the dewan rakyat which was dissolved to enable the holding of elections on 10 May 1969 which resulted in the May 13 disturbances requiring a Proclamation of Emergency on 15 May 1969.

Mr. Karpal Singh also submitted that because art. 44 of the Federal Constitution states parliament shall consist of the King, the dewan rakyat and the dewan negara, therefore, the provisions of art. 43(2) of the constitution could not have been lawfully invoked as it is the dewan rakyat which had been dissolved, and not parliament. It is also the contention of Mr. Karpal Singh that even assuming dewan rakyat could be deemed to be parliament there is no gazette to show who was appointed after the dewan rakyat had been dissolved for the purposes of art. 43(2). In any event it was submitted even if any personality or personalities had been appointed under art. 43(2), only a care-taker government could have been constituted. It was submitted that a care-taker government could only carry on day to day administration in office and nothing more and a caretaker government could not lawfully advise the King to declare an emergency. As such the Proclamation of Emercency by the King on 15 May 1969 is invalid.

Having heard the submissions made by learned counsel for the first accused, Mr. Karpal Singh and the Honourable Attorney-General for the prosecution and having studied all the relevant provisions of the law and the case authorities cited by both parties, I hereby dismissed all the issues of preliminary objection raised by Mr. Karpal Singh. The following are my grounds or reasons in arriving at the said decision.

On the point raised that ESCAR pursuant to which the trial of all the accused persons are being conducted are invalid, null and void and of no consequence on the grounds that reg. 26 of ESCAR originally speaks of a right of appeal to the Federal Court and that it later provides the right of appeal to a court to wit, the Supreme Court which is no longer in existence, it is my view that the applicable law to clarify the position is the Constitution (Amendment) Act A885 and not the amendment to the Courts of Judicature Act, namely Act A886 or Act A606 as contended by counsel Mr. Karpal Singh. By virtue of s. 46 of the Constitution (amendment) Act 1994 (Act A885), all references in and under the Federal Constitution or any written law (which includes ESCAR) to the Supreme Court shall be construed as references to the Federal Court. Thus, pursuant to Act A885 reg. 26 of ESCAR will read as, "an accused shall have the right of appeal if the decision is made by the High Court in the exercise of its original jurisdiction, he may appeal to the Federal Court." Hence, there is still the preservation of the right of appeal of the accused under ESCAR. In this respect I am in agreement with the Honourable Attorney-General's submission that the simple argument to this approach is that the constitution is the supreme law of the country and all other laws are subservient to it. It is also my view that the amendment is nothing more than a chance of names of the court from "Supreme" to "Federal". It does not in any manner whatsoever alter or abolish the status of the Federal Court which is still the highest appellate court in the country.

As to the question of whether the accused persons in this case have a right of appeal to the newly created Court of Appeal under the Constitution (Amendment) Act 1994 (Act 885), I hold the view that the right of appeal is dependent on the legal provision available in a specific statute. Generally the right of appeal is provided for under the Criminal Procedure Code or the Courts of Judicature Act. But these are statutes of general application, the operation of which can be excluded by specific statutes. On this point I would like to refer to the case of *PP v. Chu Beow Hin* [1982] 1 MLJ 135 wherein his Lordship Raja Azlan Shah Ag. LP (His Royal Highness as he then was) at p. 137 *inter alia* had this to say:

> It is a special enactment, and in passing it the legislature had its intention directed to the special case which the statute was meant to meet, and considered and provided for all the circumstances of the special case where a special provision is made in a special statute that special provision excludes the operation of a general provision in the general law – *generalibus specialia derogant.*

Thus, if a statute does not provide for an appeal to the newly created Court of Appeal (*vide* Act A885) like ESCAR, then an appeal has to lie only to the Federal Court. A support for this contention can be found in the decision of the Court of Appeal in the case of *Gana Muthusamy v. LM Ong & Co.* [1998] 4 CLJ 878 wherein his Lordship Gopal Sri Ram JCA in dealing with the issue as to whether the court had jurisdiction in the first place to entertain the appeal in that case had this to say at p. 345:

> Section 103E of the Legal Profession Act 1976 provides that any person aggrieved by the decision of the High Court shall have the right to appeal to the Supreme Court within one month of the decision of the High Court. In 1994 when this Court was established by the Federal Constitution the Courts of Judicature Act 1964 was amended in relation to appeals from the High Court. The amending legislation also provided that references in the Constitution to the Supreme Court were to be to the newly established Federal Court. The Legal Profession Act was not, however amended. Hence, it may be argued that appeals against the decision of the High Court under section 103E of the Legal Profession Act now lie, not to this Court, but directly to the Federal Court. We must therefore express our doubt as to whether this appeal has been properly brought before this Court as we may lack jurisdiction to entertain it altogether.

It is also my view that this stand taken is not unconstitutional as art. 121(2)(a) of the Federal Constitution states that the Federal Court shall have jurisdiction to determine appeals from the decisions of the Court of Appeal, of the High Court or a judge thereof. This means that jurisdiction of the Court of Appeal to hear appeals from the High Court is not exclusive. Thus the Federal Court is also empowered to hear appeals from the High Court. Article 128(3) of the

Federal Constitution provides that the jurisdiction of the Federal Court to hear appeals from, *inter alia,* a High Court shall be such as may be provided by Federal law. It is therefore not unconstitutional for a particular statute to prescribe for an appeal direct to the Federal Court. Furthermore, an appeal being a creature of statute, a provision may be made in a statute to prescribe the limits of the right of appeal given. A reference on this point may be made to the case of *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower* [1981] 2 MLJ 199 where his Lordship Abdoolcadeer J (as he then was) had this to say at p. 202:

> An appeal is the creature of statute and will only lie if a statute gives such a right and then only within the limits which the statute giving the right stipulates (*In re Bowman* [1932] 2 KB 621).

I am of the view that a provision of law in the form of reg. 26(1) of ESCAR providing for an appeal straight to the Federal Court thereby side-stepping the Court of Appeal is not illegal. This contention can be illustrated by the case of *Kulasingam v. PP* [1978] 2 MLJ 243 wherein Suffian LP said at p. 244:

> In our judgement the principle that we should apply here is the one that applies in respect of appeals by subjects within the United Kingdom, in regard to whom where there is no inherent right of appeal from a lower to a higher Court, so that the subject may appeal if and only if statute so provides. Statute there provides for appeal to, among others, the Court of Appeal, and the subject could not appeal direct to the highest Court, the House of Lords, without first going through the Court of Appeal – **until a recent Act of Parliament allowing an appellant to 'leapfrog' the Court of Appeal in certain circumstances.** (emphasis added)

I further hold the view that the validity of reg. 26(1) of ESCAR being made pursuant to the Emergency (Essential Powers) Act 1979 (Act 216) is reinforced by cl. (6) of art. 150 of the Federal Constitution which provides as follows:

> .... no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force..., shall be invalid on the ground of inconsistency with any provision of this Constitution.

As regards the contention of counsel Mr. Karpal Singh that reg. 26 of ESCAR is not severable from the rest of the provisions of the regulations, I am of the view that reg. 26 of ESCAR can exist independently of the other provisions of the regulations. It is not intrinsically intertwined with the other provisions of ESCAR. Regulation 26 falls within the part on APPEAL and even if it is severed from the remaining regulations it will not alter the scope and nature of ESCAR as a subsidiary legislation. Even if this court is to strike down reg. 26 as null and void, it does not invalidate the whole of ESCAR since the right of appeal, avenue and procedure for appeal would still be guaranteed by other existing laws such as the Criminal Procedure Code and the Courts of Judicature Act 1964.

As regards the contention of Mr. Karpal Singh that the 1969 Proclamation of Emergency dated 15 May 1969 under which the Emergency (Essential Powers) Act 1979 (Act 216) was made to validate ESCAR is null and void on the ground that the Yang di-Pertuan Agong ("YDPA") when proclaiming the emergency could not have acted on the advice of the cabinet or a minister under the general authority of the cabinet because the cabinet then had ceased to exist on the dewan rakyat standing dissolved, I am of the view it is imperative from the reading of cl. (1) of art. 150 of the Federal Constitution that the YDPA may issue a proclamation of emergency if he is satisfied that a grave emergency exists. Article 150(l) of the Federal Constitution states as follows:

> (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

In this respect I hold the view that a proclamation of emergency at that particular time in 1969 is within the royal prerogative of the YDPA in which case the YDPA can act personally without the advice of cabinet or minister acting under the general authority of the cabinet. The above view is fortified in the case of *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 1 MLJ 119 wherein his Lordship Barakbah L.P. in delivering the majority decision of the Federal Court at p. 122 had this to say:

> In my opinion the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exist it is not for the Court to inquire as to whether or not he should have been satisfied.

Hence cl. (1) of art. 40 of the Federal Constitution is inapplicable in those circumstances. In interpreting the application of cl. (1) of art. 150 of the Federal Constitution I take the view that in country with a written constitution like ours, the constitution is supreme and the courts must give meaning to the cold letter of the constitution, interpreting the provisions of the document from the words alone, without importing extraneous rules of law, practice or convention. On this point I would like to refer to the case of *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 wherein his Lordship Raja Azlan Shah FCJ (His Royal Highness as he then was) at pp. 188-189 had this to say:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' - see *Adegbenro v. Akintola & Anor*. [1963] 3 All ER 544. Each country frames its constitution according to its genius and for the

> good of its own society. We look to other Constitution to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

Even assuming the position that the YDPA has to act on the advice of a cabinet of ministers in order for the YDPA to invoke his powers to issue a proclamation of emergency, I still hold the view that if parliament is dissolved and no new appointment is made while its dissolution is on, the cabinet does not cease to exist and it can advise the YDPA in the exercise of his functions. The subsisting cabinet will tend to be the care-taker government and to my mind a care-taker government can advise the YDPA on policy matters which include national emergencies, but it is up to the YDPA whether to act pursuant to the advice or not. To support the above contention I only need to refer to the case of *Madan v. Charan Cal. 95* (paras 2, 15) to quote from pp. 412 and 413 of *Basu's Commentary on the Constitution of India*, 6th edn. vol. 'E' arts. 32-75, 1981; wherein it is stated as follows:

> The question, on the merits, as to what should be the status of this Council of Ministers during the period of dissolution or until an alternative Ministry commanding the confidence of the House can be formed. The learned Judge of the Calcutta High Court opined that when a Council of Ministers, after its resignation, is asked by the President to continue in office, 'until other arrangements are made', it holds office only as "care-taker Government" so that it can advise the President only on matters of day to day administration which is necessary for carrying on 'for making alternative arrangements' and that if such a Ministry advised the President to act on a policy matter, the President would not be obliged to act according to that advice. The learned Judge has conceded that there is no mention of any 'care-taker Government' in the Constitution of India, but relies on an observation in *Jennings on Cabinet Government.*

It is also my view that if the court were to agree with the case of *Teh Cheng Poh*, wherein, the Privy Council advised that the power exercisable by the YDPA, must be exercised in accordance with the advice of the cabinet, it is submitted that it is only true in a situation where the parliament is sitting and the cabinet in existence. In a situation where there is no cabinet to advise the YDPA, then he is expected to act on his own. This is so by drawing an analogy with cl. 2(a) of art. 40 of the Federal Constitution, wherein the YDPA can act on his own in the appointment of a Prime Minister. Although this cl. 2(a) of art. 40 expressly provides for the YDPA to act on his own discretion, the absence of such a clause in art. 150(l) of the Federal Constitution will not attract the operation of cl. 1 of art. 40 of the said constitution, since at that point of time there is no cabinet in existence to advise the YDPA. Similarly in a situation where the dewan rakyat is dissolved and the cabinet ceased to exist the YDPA is still empowered to issue a Proclamation of

Emergency independently. To my mind to insist that cl. 1 of art. 40 to be strictly adhered to in such a situation would render cl. (1) of art. 150 nugatory. In this respect in my view cl. 1 of art. 150 of the Federal Constitution has to be given a purposive interpretation because it is enacted to empower the YDPA to issue a Proclamation of Emergency irrespective of the existence of the cabinet, as long as the situation warrants for invocation of such a power. Support for the contention on this purposive interpretation can be found in the case of *PP v. Sihabduin & Anor.* [1980] 2 MLJ 273 wherein his lordship Suffian LP in delivering the judgment of the Federal Court at p. 275 had this to say:

> Where the meaning of the words is plain and ambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral, or to paraphrase the words of Lord Scarman at page 551 in the case of *Duport Steels Ltd. v. Sirs* (1980) 1 All ER 529, in the field of statute law the judge must be obedient to the will of the lawmaker as expressed in its enactment. The judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it.

On the validity of the Proclamation of Emergency in 1969 it has to be emphasised here that the validity of the proclamation P.U.(A) 145/69 has not been challenged since its promulgation. It has to be categorically noted and emphasised that Mr. Karpal Singh himself had once conceded to the validity of the proclamation P.U.(A) 145/1969. This can be seen in the case of *Madhavan Nair v. Government of Malaysia* [1975] 2 MLJ 286 wherein at p. 287 his Lordship Chang Min Tat J (as he then was) *inter alia* states as follows:

> nothing turns on the Proclamation. It is not argued for the applicant that this Proclamation is invalid or has not been properly proclaimed or that it is not still in force. Neither is it contended that it has not been properly laid before both Houses of Parliament in accordance with Article 150(3) or that any resolution has been passed annulling it or that it has been revoked. Mr. Karpal Singh for the applicant concedes the validity of the Proclamation.

On the point of concession made by counsel on a certain point of law, I agree with Mr. Karpal Singh that he is at liberty now to take a different view on the same matter. (See the case of *Ahmad Tajudin bin Haji Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225. It is well settled that counsel is not bound by an erroneous admission of law that he made. Neither is the court. If counsel makes an erroneous admission of law, he may withdraw it at any time, even on appeal. Mr. Karpal Singh now takes the stand that

the Proclamation of Emergency by the YDPA in May 1969 was invalid on the ground that the YDPA did not act on the advice of the cabinet as required by art. 40(l) of the constitution. He also argued that both cl. (8) to art. 150 of the constitution and s. 12 of Act 216 are not retrospective in operation thereby not affecting the Proclamation of Emergency dated 15 May 1969 in relation to its validity in point of judicial review thereof. It is to be noted on this point that the Honourable Attorney general had earlier submitted that the fact that the validity of the said Proclamation of Emergency had not been challenged since its promulgation is Further reiterated by the Constitution (Amendment) Act 1981 (Act 514) which came into force on 15 May 1981, wherein a new cl. (8) to art. 150 was inserted. Clause (8) is an ouster clause and it totally precludes any form of challenge of the Proclamation of Emergency on any grounds whatsoever in a court of law. A provision of similar effect is found in s. 12 of the Emergency (Essential Powers) Act 1979 (Act 216). The Honourable Attorney-General hence, contended that given the terms of the said ouster clause provisions, it would appear that art. 150(l) and (2) under which the proclamation is made would leave no scope at all for a jurisdictional challenge in point of law. It was further contended for the prosecution that the scope of application of cl. (8) of art. 150 has also gained judicial recognition by the Court of Appeal in the recent case of *Dato' Seri Anwar Ibrahim v. PP* [2000] 2 CLJ 695. Hence its applicability cannot be questioned. On this point even assuming that the contention of Mr. Karpal Singh is correct in that the Constitution (Amendment) Act 1981 (Act A514) which brought in the said ouster cl. (8) of art. 150 is not retrospective in operation and for the purposes of the Proclamation of Emergency dated 15 May 1969 the 1981 amendments to art. 150 are irrelevant, I would still for reasons or grounds herein before already stated hold the view that with or without the advice of the cabinet the YDPA had the royal prerogative and the personal discretion to validly invoke the said Proclamation of Emergency on 15 May 1969.

Last but not least, on the submission of the application of the Privy Council decision of the case of *Teh Cheng Poh* I would only need to state that the said Privy Council decision prompted a legislative response by way of the Emergency (Essential Powers) Act 1979 (Act 216), enacted under art. 150(5) of the constitution to supersede and validate the Emergency (Essential Powers) Ordinance 1969. Its long title reads:

> .... to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after February 20th 1971, and for the validation of all acts and things done under the said Ordinance or any subsidiary legislation made or purporting to have been made thereunder, and to provide for matters connected therewith.

The Emergency (Essential Powers) Ordinance 1969, the parent legislation under which the disputed Essential (Security Cases) Regulations 1975 were made, itself was repealed (see s. 13(l) of Act 216). But the Act reproduced the substantial rule-making powers of the Ordinance. (See s. 9(1) of Act 216). Section 13(2) of Act 216 further provides for the validation of regulations made under the ordinance, whether before or after parliament had sat, and these were deemed to have been made under the Act. Hence the Essential (Security Cases) (Amendment) Regulations 1975 must be deemed to be valid. It is noted that the said Act 216 had been challenged, but the clear view emerging from the past decision of the Federal Court has been in favour of regarding parliament as having the power to enact such legislation with retrospective effect, and on the wording of the Act, as not enacting in a manner amounting to an assumption of judicial power. In the subsequent case bearing the same title, *Teh Cheng Poh v. P.P.* [1979] 2 MLJ 238, the Federal Court simply held *inter alia* at p. 239 as follows:

> The regulations having been ruled to be *ultra vires*, it is open to Parliament to validate them and, further to validate them with retrospective effect... .

I am of the view that the said Act 216 did not encroach on the judicial power which by art. 121 of the constitution is vested in the courts. On this point I would refer to the case of *Phang Chin Hock v. PP* [1980] 1 MLJ 70, wherein the Federal Court adhered to the view that so long as the factual questions of guilt and innocence, and sentence, are still left for the courts to determine, there can be no ground to suppose a legislative transgression of judicial power. An Act is said to be valid even if it completely alters what was earlier perceived by the courts to be correct law.

For reasons above stated I therefore hold the view that the Essential (Security Cases) (Amendment) Regulations 1975 (ESCAR) pursuant to which the trial of all the accused persons are being conducted are valid and enacted in accordance with the law. With this decision I hereby make an order that the trial of all the accused persons in this case shall be continued and proceeded forthwith.